Jamalludin B Khadiron v Public Prosecutor

HIGH COURT (IPOH) — CRIMINAL APPEAL NO 42-5 OF 2003
VT SINGHAM J
9 MAY 2004

Criminal Procedure — Sentence — Adequacy of sentence — Accused sentenced to five years' imprisonment and two strokes of rotan for offence of attempted rape on ten-year old child — Accused pleaded guilty — Whether sentence adequate — Whether one-third reduction of sentence of imprisonment should be given to accused

Criminal Procedure — Sentence — Adequacy of sentence — Whether failure on part of prosecution to file appeal against inadequacy of sentence precluded court from exercising revisionary powers under s 325 of Criminal Procedure Code

Criminal Procedure — Sentence — Concurrent or consecutive — Accused sentenced to imprisonment for two offences of attempted rape on two ten-year old children — Whether offences committed were distinct and separate offences

The appellant had pleaded guilty to an offence of attempted rape on a child aged ten years, and punishable under ss 376 and 511 of the Penal Code. He was convicted by the sessions court, Ipoh, and sentenced to five years' imprisonment and two strokes of the rotan ('the second sentence'). Earlier on, the accused had been convicted and sentenced by another sessions court in Ipoh ('sessions court 1') to seven years' imprisonment and three strokes of the rotan ('the first sentence') in respect of an offence of attempted rape punishable under ss 376 and 511 of the Code ('the other offence'). The second sentence was ordered to run consecutively with the first sentence.

The appellant, being dissatisfied that the second sentence was to run consecutively with the first sentence, appealed against the sentence.

Held, dismissing the appeal:

(1) The order of the learned sessions court judge should not be disturbed and the sentences should run consecutively because the first sentence as imposed by the sessions court was also for an offence of a similar nature on a ten-year-old child. Hence, the appellant's appeal to substitute the order of the learned sessions court judge from a consecutive to concurrent sentence was not appropriate on the facts and in the circumstances of the case (see para 4).

(2) In considering whether the sentences should run concurrently or consecutively, this court took into account the fact that the offence of attempted rape committed by the appellant on the ten-year-old child in respect of the case at Sessions Court 1 was a distinct and separate offence. Therefore, the offence committed in respect of the case at Sessions Court 1 did not arise out of the same transaction (see para 11).

(3) While the appellant was concerned about his mother whom he had to take care of, the court cannot disregard the physiological trauma, embarrassment and the despicable and shameful crime he had

committed on an innocent child. As such, the order of the learned sessions court for the second sentence to run consecutively with the first sentence should be maintained (see para 12).

(4) The failure on the part of the prosecution to file an appeal against inadequacy of the sentence did not preclude the court from exercising its revisionary powers as provided under s 325 of the Criminal Procedure Code since the background of the appellant and the nature of the other offence had come to the knowledge of this court. Nevertheless, the discretion to exercise its revisionary powers had to be judicial, and in the event the court was inclined to enhance the sentence, the accused should be accorded a reasonable opportunity of showing cause against such enhancement (see para 17).

(5) The second sentence of five years' imprisonment and two strokes of the rotan was manifestly inadequate and ought to be enhanced to reflect the gravity of the offence. Although the learned Sessions Court Judge had stated that the public interest must be taken into consideration in respect of this type of case and that a deterrent sentence and rotan had to be considered, he had failed to reflect his thoughts in the sentence imposed. Further, the learned sessions court judge had also failed to take into consideration the conviction and sentence imposed by the Sessions Court 1 and the accused's previous conviction for an offence of kidnapping a person with the intention to force her to marry him (see paras 20 and 21).

(6) Generally, a one-third reduction of the sentence of imprisonment is given to offenders who plead guilty to a charge after taking into account any mitigating factor that is available before the sentence is imposed. However, this one-third reduction is not automatic. A guilty plea ought to be considered in favour of the accused only when all other factors and the circumstances surrounding the commission of the offence justified such a consideration. Here, the appellant seemed to be a persistent offender in committing attempted rape on children. The need to protect public interest and safety outweighed the plea of guilty as a factor in obtaining a lenient sentence (see para 24).

(7) This was an appropriate case for the court to exercise its revisionary powers with a view to enhance the sentence and there were no mitigating factors in all the circumstances and facts of the case. Accordingly, the sentence was increased to seven years' imprisonment and three strokes of the rotan, to run consecutively with the first sentence (see paras 39 and 40).

[Bahasa Malaysia summary

Perayu telah mengaku bersalah ke atas kesalahan percubaan merogol ke atas kanak-kanak berusia sepuluh tahun dan boleh dikenakan hukuman di bawah s 376 dan 511 Kanun Keseksaan. Tertuduh disabitkan di mahkamah seksyen di Ipoh dan dikenakan hukuman selama lima tahun penjara dan dua sebatan rotan (kesalahan kedua). Sebelum ini tertuduh

telah disabitkan kesalahan dan telah dihukum tujuh tahun penjara dan tiga sebatan rotan oleh mahkamah seksyen yang lain di Ipoh (Mahkamah Seksyen 1) atas percubaan merogol di bawah seksyen 376 dan 511 Kanun Keseksaan. Hukuman yang kedua diperintahkan supaya dijalankan selepas hukuman yang pertama tamat.

Perayu tidak berpuas hati bahawa hukuman yang kedua berjalan selepas hukuman yang pertama tamat telah merayu kepada mahkamah.

Diputuskan, rayuan ditolak:

(1) Keputusan yang dibuat oleh mahkamah seksyen yang pertama tidak patut diganggu dan keputusan patut berjalan selepas hukuman yang pertama tamat kerana tertuduh telah melakukan kesalahan yang sama. Jadi rayuan tertuduh itu tidak boleh dipertimbangkan mengikut fakta yang dikemukakan (lihat perenggan 4).

(2) Untuk mempertimbangkan sama ada hukuman patut dijalankan bersaman atau selepas mahkamah telah mengambil kira fakta bahawa tertuduh telah melakukan dua kesalahan yang berlainan dan bukannya kesalahan yang sama walaupun jenis dan secara kesilapan yang dilakukan adalah sama (lihat perenggan 11).

(3) Mahkamah prihatin mengenai ibu perayu yang di bawah tanggungan perayu tetapi mahkamah tidak boleh membiarkan perayu bebas tanpa menghukumnya atas trauma dan rasa malu yang dialami oleh mangsa. Tambahan pula tertuduh telah melakukan satu kesalahan yang amat kejam dan memalukan terhadap mangsanya. Jadi keputusan mahkamah seksyen untuk hukuman terhadap kesalahan yang kedua patut dijalankan selepas hukuman kesalahan pertama tamat (lihat perenggan 12).

(4) Kegagalan pihak pendakwa untuk memfailkan rayuan atas hukuman yang tidak memandai tidak menghalang mahkamah dari menggunakan kuasa yang diberikan di bawah seksyen 325 Kanun Prosedur Jenayah memandangkan mahkamah tahu tentang kesalahan yang dibuat perayu dan juga latar belakang perayu. Walau bagaimanapun ini terpulang kepada budi bicara kehakiman. Walaupun mahkamah ingin menambahkan hukuman yang dikenakan tertuduh mesti diberikan peluang yang cukup untuk membela diri dari peningkatan tempoh hukuman (lihat perenggan 17).

(5) Hukuman selama lima tahun bagi kesalahan yang kedua iaitu penjara selama lima tahun dan dua sebatan rotan adalah tidak memandai dan patut dinaikkan kerana kesalahan yang dibuat adalah serius. Walaupun hakim mahkamah seksyen telah menyatakan bahawa kepentingan masyarakat patut diambil kira dan hukuman ini patut dijadikan teladan dan sebatan rotan patut diambil kira, beliau tidak dapat mengemukakan pendapatnya. Tambahan pula hakim mahkamah seksyen tersebut juga tidak mengambil kira sabitan dan hukuman yang dikenakan oleh mahkamah seksyen yang pertama dan kesalahan tertuduh yang lain iaitu kesalahan penculikan seorang

wanita untuk memaksa wanita tersebut berkahwin dengan tertuduh (lihat perenggan 20 dan 21).

(6) Secara am, satu pertiga dari tempoh penjara dikurangkan untuk pesalah yang mengaku salah atas kesalahan yang dilakukan dan selepas mengambil kira apa-apa faktor mitigasi. Walau bagaimanapun pengurangan tempoh penjara ini bukanlah secara automatik ianya akan diberikan jika faktor luaran yang lain dapat mejustifikasikan tempoh pengurangan penjara tersebut. Di dalam kes ini perayu adalah seorang yang kerap melakukan kesalahan-kesalahan yang serius seperti percubaan merogol. Jadi masyarakat patut dilindungi dari orang seperti tertuduh dan tempoh penjara tidak wajar dikurangkan walaupun tertuduh mengaku bersalah (lihat perenggan 24).

(7) Ini adalah satu kes yang sesuai untuk mahkamah menggunakan kuasanya untuk menambahkan tempoh penjara dan tiada apa-apa faktor mitigasi di sini.Tempoh penjara tertuduh telah ditambah kepada tujuh tahun dan tiga sebatan rotan dan akan berjalan selepas tempoh penjara pertama tamat (lihat perenggan 39 dan 40).]

Notes

For cases on adequacy of sentence, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2850-2878.

Cases referred to

Abdul Karim v R [1954] MLJ 86 (refd)
Abu Seman v PP [1982] 2 MLJ 338 (refd)
Ang Chai Seng v PP [2000] 1 CLJ 213 (refd)
Attorney Generals' References (*Nos 120, 91 and 119 of 2002*) [2003] 2 All ER 955 (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83 (refd)
DR Garner v PP [1973] 1 MLJ 106 (refd)
Hj Johari bin Hj Abd Karim v PP [1989] 2 MLJ 276 (refd)
Hashim bin Pawanchee & Anor v PP [1988] 2 MLJ 66 (refd)
Lee Chow Meng v PP [1976] 1 MLJ 287 (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167 (refd)
New Tuck Shen v PP [1982] 1 MLJ 27 (refd)
PP v Chung Kwong Huah [1981] 1 MLJ 316 (refd)
PP v Govindnan Chinden Nair [1998] 2 CLJ 370 (refd)
PP v Jafa bin Daud [1981] 1 CLJ 315 (refd)
PP v Lee Tak Keong [1989] 1 MLJ 307 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Ng Chong Wan [1988] 3 MLJ 114 (refd)
PP v Ooi Wang San [1998] 2 MLJ 765 (refd)
PP v Ravindran & Ors [1993] 1 MLJ 45 (refd)
PP v Safian bin Abdullah & Anor [1983] 1 CLJ 324 (refd)
PP v Sulaiman bin Ahmad [1993] 1 MLJ 74 (refd)
PP v Teh Ah Cheng [1976] 2 MLJ 186 (refd)
PP v Teo Heng Chye [1989] 3 MLJ 205 (refd)
PP v Wong Kok Sein & Ors [1988] 2 MLJ 436 (refd)
PP v Yap Huat Heng [1985] 2 MLJ 414 (refd)

R v Saleem [1964] Crim LR 482 (refd)
R v Walsh [1965] Crim LR 248 (refd)
Raja Izzuddin Shah v PP [1979] 1 MLJ 270 (refd)
Reg v Blake [1962] 2 QB 377 (refd)
Reg v Davies (1978) 67 Cr App R 207 (refd)
Reg v Sargeant [1974] 60 Cr App R 74 (refd)
Rex v Grondkowski [1946] 1 All ER 560 (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134 (refd)
Sim Gek Yong v PP [1995] 1 SLR 537 (refd)
Tan Bok Yeng v PP [1972] 1 MLJ 214 (refd)
Tan Lay Chen v PP [2001] 1 MLJ 135 (refd)
The Queen v Cutbush & Anor [1867] LR 2 QB 329 (refd)

Legislation referred to

Criminal Procedure Code ss 282(d), 292(1), 325
Penal Code ss 366, 376, 511

Appellant in *person*
Siti Badariah bt Mohd Yusof DPP (Deputy Public Prosecutor) for the respondent

VT Singham J:

[1] In this case, the appellant had pleaded guilty to an offence of attempted rape on a child aged 10 years, and punishable under ss 376 and 511 of the Penal Code. He was convicted and sentenced to five years' imprisonment and ordered to undergo whipping of two strokes of the rotan on 22 January 2003 by the Sessions Court No 2, Ipoh. He was also convicted and sentenced to seven years' imprisonment and ordered to undergo three strokes of the rotan for an offence of attempted rape punishable under ss 376 and 511 of the Penal Code by the Sessions Court No 1, Ipoh vide Arrest Case No 62–96–2002 on 21 January 2003. The sentence of five years' imprisonment imposed by the Sessions Court No 2 on 22 January 2003 was ordered to run consecutively with the sentence of seven years' imprisonment imposed by the Sessions Court No 1 on 21 January 2003. The appellant was dissatisfied with the order of his sentence to run consecutively with the sentence of seven years' imprisonment. Hence, this appeal is against the sentence. At this stage, it is important to state that although the Notice of Appeal states that the appeal is against the conviction and sentence, the appellant at the outset of the appeal informed this court that he was dissatisfied only with the order of his sentence to run consecutively and he wished to proceed with the appeal only against that order.

[2] The charge against the appellant at the Sessions Court No 2, Ipoh in respect of the instant appeal is as follows:

> Bahawa kamu pada 14 March 2002 di antara jam 12 tengahari hingga jam 6 petang di kawasan semak berdekatan Taman Tinggi, Kg Baru, Ipoh di dalam Daerah Kinta di Negeri Perak Darul Ridzuan telah cuba merogol seorang budak perempuan bangsa Melayu nama Intan Norazatul Azima binte Rozemi berumur 10 tahun dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 376/511 Kanun Kesiksaan.

[3] On 10 March 2004, when the appeal came up before this court, the appellant appealed to this court to order the sentence of five years' imprisonment to run concurrently with the sentence of seven years' imprisonment instead of consecutively. When asked by this court as to why the sentences should run concurrently and not consecutively, he replied that he has an aged mother to look after. When questioned further by this court as to whether the victim and the date of the offences were the same in respect of the sentence imposed by the Sessions Court No 1, he replied that it was not the same. This court then upon hearing the reply of the learned Deputy Public Prosecutor for the respondent stood down the appeal to call for the file in respect of the conviction by the Sessions Court No 1 to check on the particulars of the date and place of the offence and the victim. Having called for the file, this court found that the appellant had also committed attempted rape on a child aged 10 years on 18 March 2002 at 6 pm, ie four days after the date of the offence being 14 March 2002 in the instant appeal. In *PP v Jafa bin Daud* [1981] 1 CLJ 315 at p 316, His Lordship Mohamed Azmi J (as he then was) said:

> A 'sentence according to law' means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles. *In assessing sentence, one of the main factors to be considered is whether the convicted person is a first offender. It is for this purpose that before passing sentence, a Magistrate is required to call for evidence or information regarding the background, antecedent and character of the accused. Where the convicted person has previous records and admits them as correct, the court must consider whether the offence or offences committed previously were of similar nature as the one with which he is presently charged. The court must then consider the sentences imposed in the previous convictions for similar offences to determine whether they have had any deterrent effect on him. Where he is found to be a persistent offender for a similar type of offences, then it is in the interest of justice that a deterrent sentence should be passed and, in such a case, unless there are exceptional circumstances, the quantity, nature or value of the subject-matter of the offence with which he is currently charged can very rarely constitute a mitigating factor.* (emphasis by this court)

[4] On the appeal by the appellant for the sentence to run concurrently, this court is of the view that the order of the learned Sessions Court Judge should not be disturbed and that the sentences should run consecutively as, first, the sentence of seven years' imprisonment and three strokes of the rotan as imposed by the Sessions Court No 1, Ipoh was also for an offence of a similar nature on a child aged 10 years, being attempted rape where the date and the victim was different, whereas the offence of attempted rape in respect of the instant appeal was on another victim who was also a child aged 10 years and on a different date. Hence, the appellant's appeal to substitute the order of the learned Sessions Court Judge from consecutive to concurrent sentence is not appropriate on the facts and in the circumstances in the instant appeal. However, this court has considered the distinction that where several offences are committed in the same transaction and are tried together it is generally appropriate that the sentences imposed for those offences should be ordered to run concurrently (see *R v Saleem* [1964] Crim LR 482, *R v Walsh* [1965] Crim LR 248). Section 292(1) of the Criminal Procedure Code states:

When a person who is an escaped convict or is undergoing a sentence of imprisonment is sentenced to imprisonment, such imprisonment shall commence either immediately or at the expiration of the imprisonment to which he has been previously sentenced, as the Court awarding the sentence may direct.

[5] Section 282(d) of the Criminal Procedure Code states:

Every sentence of imprisonment shall take effect from the date on which it was passed unless the Court passing the sentence otherwise directs.

[6] However, each case is dependent on the set of its own facts, circumstances and the background of the accused. In the instant appeal, the offence committed by the appellant and the sentence imposed upon conviction did not arise out of the same transaction as the conviction and sentence imposed by the Sessions Court No 1.

[7] In *The Queen v Cutbush & Anor* [1867] LR 2 QB 329, Cockburn CJ said:

... as right and justice require, when a man has been guilty of separate offences, for each of which a separate term of imprisonment is a proper form of punishment, that he should not escape from the punishment due to the additional offence, merely because he is already sentenced to be imprisoned for another offence, and as it would be contrary to public policy and expediency that he should so escape with but one punishment; (emphasis by this court)

[8] In *PP v Yap Huat Heng* [1985] 2 MLJ 414 at p 416, His Lordship Shaik Daud J (as he then was) said:

Where two or more distinct offences had been committed, sentences of imprisonment should not be made to run concurrently. It should only be made concurrent when an offender had been convicted of a principal and a subsidiary offence. In all other cases sentences should be made to run consecutively. (see *Faulkner* [1972] 56 Cr App R 594, *Haji Johari bin Haji Abd Karim v PP* [1989] 2 MLJ 276, *Sau Soo Kim v PP* [1975] 2 MLJ 134, *Kanagasuntharam v PP* [1992] 1 SLR 81 at p 83 and *R v Skinner* [1986] Cr App R (S) 166).

[9] In *PP v Teo Heng Chye* [1989] 3 MLJ 205, Coomaraswamy J said:

We also considered the totality of the two sentences which is 14 years. In this, we were following the words of the Lord Chief Justice of England in *R v Faulkner* at p 596 where he said. 'However, at the end of the day, as one always must, one looks at the totality and asks whether it was too much'.

We asked ourselves this question and felt that having regard to all the facts of the case as referred to by us, the totality of 14 years was not `too much' and in our view, entirely appropriate. Our order was that the sentences were to run from the date of arrest of the accused, 22 March 1985. (see *Vaitos v R* [1981] 4 A Crim R 238 at p 301 and *Crowley and Garner v R* [1991] 55 A Crim. R 201)

[10] In *PP v Ooi Wang San* [1998] 2 MLJ 765 at pp 767-768, His Lordship Shaik Daud JCA for the Court of Appeal said:

The law on the commencement of sentences of imprisonment on prisoners already undergoing imprisonment, as in this case, is provided for in s 292 of the Criminal Procedure Code (FMS Cap 6). This provision gives a discretion to the court, depending on the facts and circumstances of each particular case, whether

to order the commencement of the sentence on such convicted persons, either immediately or at the expiration of the imprisonment to which he has been previously sentenced.

The respondent Ooi Wang San in that case appealed to the Federal Court vide Criminal Appeal No: 05 – 6 – 98 (A) against the decision of the Court of Appeal. The appeal was dismissed by the Federal Court on 12 October 2000 [Coram: Wan Adnan B Ismail CJM, Steve Shim Lip Kiong, CJ Sabah and Sarawak and Ahmad Fairus B Dato Sheikh Abdul Halim FCJ (as he then was)].

[11] In considering whether the sentences should run concurrently or consecutively, this court took into account: (i) that the offence of attempted rape committed by the appellant on the child of 10 years old in respect of the case at the Sessions Court No 1, Ipoh was clearly a distinct and separate offence, (ii) the facts of the case in respect of the sentence of the case of attempted rape imposed by Sessions Court No 1, were also similar in that the appellant had also carried the victim on his motorcycle, took her to the place of incident and attempted to rape her by rubbing his penis on her private parts, and (iii) therefore, the offence committed in respect of the case at Sessions Court No 1 did not arise out of the same transaction (see *The Queen v Cutbush & Anor* [1867] LR 2 QB 329, *PP v Yap Huat Heng* [1985] 2 MLJ 414, *Abu Seman v PP* [1982] 2 MLJ 338, *Hashim bin Pawanchee & Anor v PP* [1988] 2 MLJ 66, *Hj Johari bin Hj Abd Karim v PP* [1989] 2 MLJ 276, *PP v Wong Kok Sein & Ors* [1988] 2 MLJ 436, *Sau Soo Kim v PP* [1975] 2 MLJ 134 and *PP v Ng Chong Wan* [1988] 3 MLJ 114).

[12] While the appellant is concerned for his mother whom he has to take care of, this court cannot disregard the physiological trauma, embarrassment and the despicable and shameful crime he has committed on an innocent child who was only 10 years old at the time of the commission of the offence. The order of the learned Sessions Court for the sentence to run consecutively with the sentence of seven years' imprisonment imposed by the Sessions Court No 1 for the offence of attempted rape committed on a child of 10 years old should be maintained. Accordingly, the appeal against the order of the sentence of five years' imprisonment to run consecutively with the sentence of seven years' imprisonment is dismissed.

[13] On further reading the facts of the case presented in the Sessions Court by the prosecution in respect of the instant appeal which was marked as exhibit P 1, upon perusal of the offence as framed by the charge and the notes of proceedings, this court is of the view that the sentence of five years' imprisonment and two strokes of the rotan is manifestly inadequate and ought to be enhanced to reflect the gravity of the offence and taking into account that the victim was only 10 years old and the appellant had committed the offence when the victim was on her way back to school and was brought to the bushes where he rubbed his penis on her private parts.

[14] On the Court's revisionary powers, s 325 of the Criminal Procedure Code states as follows:

Powers of Judge on revision.

(1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.

(3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction.

[15] Therefore, this court gave an opportunity to the appellant to give any good reasons why this court should not exercise its revisionary powers as provided under s 325 of the Criminal Procedure Code to enhance the sentence. This court had also read the notes of proceedings as recorded by the learned Sessions Court Judge to the appellant and he admitted the same. The appellant appealed to this court not to enhance the sentence. This court also invited the learned Deputy Public Prosecutor to address the court as to whether this court should exercise its revisionary powers notwithstanding the fact that there was no appeal by the Public Prosecutor against the sentence. The learned Deputy Public Prosecutor at the invitation of the court submitted that this court has the power to exercise its revisionary powers with a view to enhance the sentence.

[16] In *Attorney Generals' References* (*Nos 120, 91 and 119 of 2002*) [2003] 2 All ER 955, it is stated:

In all cases of sexual interference, whether amounting to rape or not, it was necessary to take into account all the degree of harm to the victim; the level of the offenders culpability; and the level of risk to society posed by the offenders. In all classes of sexual offences, it was also necessary to deter others from acting in a similar fashion. Moreover, before passing a lighter sentence because the offences were stale, the court should weight the impact on the victim ...'

[17] This court is of the view that the failure on the part of the prosecution to file an appeal against inadequacy of the sentence does not however preclude this court from exercising its revisionary powers as provided under s 325 of the Criminal Procedure Code since the background of the appellant and the nature of the offence in respect of Sessions Court No 1 has come to the knowledge of this court. Nevertheless, the discretion to exercise its revisionary powers has to be judicial and, in the event this court is inclined to enhance the sentence, the accused should be accorded a reasonable opportunity of showing cause against such enhancement. In the instant appeal, since the Record of Appeal contains the particulars of the conviction by Sessions Court No 1 for a similar offence, it is considered that the proceedings at Sessions Court No 1 has come to the knowledge of this court as envisaged by s 325 of the Criminal Procedure Code. Framing and/or reducing a charge is the prerogative of the Public Prosecutor but what sentence ought to be passed for a particular offence and on the set of facts is at the discretion of the court so long as the established sentencing

principles are not disregarded. In *New Tuck Shen v PP* [1982] 1 MLJ 27 at p 30, His Lordship Wan Yahya J (as he then was) said:

> '*... the power to impose any sentence lies absolutely with the court and not with the learned Deputy Public Prosecutor or defence counsel. If the court were to heed the behest of the Deputy Public Prosecutor on sentence, there would probably be lesser men walking in the sunshine today. Similarly appellate courts have often exercised their powers of revision to enhance sentences imposed by lower courts although the prosecution was apparently satisfied with the sentence.* Such an advice, if in fact given by counsel, is indeed founded on error of law and a mistake in law will not form a good ground for appeal, but will merely give rise to discretion to allow the change of plea. (emphasis by this court)

[18] In another passage in that case, His Lordship Wan Yahya J (as he then was) said:

> *The right to impose punishment on a guilty party is absolutely the discretion of the court.* It will exercise that power judicially but will not tolerate any encroachment or even semblance of encroachment either by the prosecution or the defence in respect of such right. (emphasis by this court)

[19] In that case His Lordship Wan Yahya J (as he then was) had also explained the element of public interest where His Lordship said:

> *Public interest varies according to the time, place and circumstances of each case including its nature and prevalence*. What may be of public interest in one place may differ from another. Similarly inducement to turn from criminal ways into honest living can take several forms and will have to depend to a greater extent on the attitude of the offender and his suitability for any particular type of reformation. (emphasis by this court)

[20] This court is mindful, first, that the courts are loath to interfere with the sentence passed by the lower court unless it was manifestly inadequate or wrong in law or the court did not observe the established sentencing principles (see *Bhandulananda Jayatilake v PP* [1982] 1 MLJ 83 and followed in *Ang Chai Seng v PP* [2000] 1 CLJ 213) and, secondly, the powers given to this court to revise a sentence on the courts own volition has to be exercised sparingly. In the instant appeal, the learned Sessions Court Judge having stated that the public interest must be taken into consideration in respect of this type of case, that the victim was still a child at the material time and that a deterrent sentence and rotan has to be considered, had failed to reflect his thoughts in the sentence he had imposed on the appellant. On the other hand, he has stated five years' imprisonment is the minimum sentence provided under s 376 of the Penal Code and, hence, he imposed the minimum sentence of five years' imprisonment. Furthermore, the learned Sessions Court Judge had also failed to take into consideration that the accused had a previous conviction and was sentenced to 24 months' imprisonment on 18 October 2000 for an offence of kidnapping a person with the intention to force her to marry just about two and a half years prior to the date of the offence, being 14 March 2002, in the instant appeal and the conviction and sentence imposed by the Sessions Court No 1 for a similar offence.

[21] On considering the nature of the offence, the age of the victim, the facts in the instant appeal and the justice of the case, this court is of the view that the sentence imposed by the Sessions Court No 2 was manifestly inadequate. The sentence of five years' imprisonment imposed by the learned Sessions Court Judge was not only manifestly inadequate but not suited to the facts which led to the offence in the instant appeal, the background of the appellant, and bearing in mind that sexual offences upon children has alarmingly increased recently and is rampant. Further, it has also come to the knowledge of this court from the record of proceedings at Sessions Court No 1 that the appellant had also committed a similar offence on a child of 10 years old by rubbing his penis on her private parts which is a similar pattern as per the facts in the instant appeal.

[22] Generally, the aim of deterrence is two-fold, one is to deter the offender himself from committing the offence in the future, and the other is to deter other would-be offenders from committing a similar offence. In *Tan Bok Yeng v PP* [1972] 1 MLJ 214, His Lordship Sharma J said:

> I am quite aware that the law does provide for a lesser sentence or no sentence at all imposed upon persons of young age. There has, however, emerged in recent years in our society certain species of crimes which the alacrity of mind and body, the dare, dash and defiance of the youth alone is capable of performing and producing. *Law cannot, in my view, remain merely a static and a meaninglessly passive, if ornamental and an orthodox instrument of justice, ineffective in its results and application. The social needs of the times have to be met and effectively met.* It is not merely the correction of the offender which is the prime object of punishment. The considerations of public interest have also to be borne in mind. *In certain types of offences a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society.* (emphasis by this court)

[23] Public interest and justice demands that the court must show its abhorrence and one of the ways is to impose a deterrent sentence. People who commit sexual offences on children deserve no mercy from this court. In submitting at the Sessions Court No 2, Ipoh in respect of the instant appeal, the learned Deputy Public Prosecutor informed the Sessions Court Judge that the victim was on her way back to school when she was brought to the bushes by the appellant and he committed a heinous crime on a child. In attempting to rape the child who was 10 years old, the appellant rubbed his penis on her private parts which no doubt is most disgusting for a school-going child of 10 years to encounter this shocking and unpleasant experience from the appellant, an adult of 27 years. Public interest must be reflected in the sentence imposed by the court to deter other would-be offenders especially in cases involving sexual offences on children where the victim has to go through not only a traumatic experience and unpleasant experience, but where that feeling is imposed and shared by the parents.

[24] This court has also considered that a one-third reduction of the sentence of imprisonment is generally given to offenders who plead guilty to the charge after taking into consideration any mitigating factor that is available before the sentence is imposed. (see *Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167, *Sau Soo Kim v PP* [1975] 2 MLJ 134, *PP v*

Sulaiman bin Ahmad [1993] 1 MLJ 74 and *PP v Ravindran & Ors* [1993] 1 MLJ 45). However, on the other hand, it must be observed that there is no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment. The application of a one-third reduction of the sentence in favour of an accused depends on the circumstances and facts of each case. (see *PP v Govindnan Chinden Nair* [1998] 2 CLJ 370, *Sim Gek Yong v PP* [1995] 1 SLR 537 and *Tan Lay Chen v PP* [2001] 1 MLJ 135). A guilty plea ought to be considered in favour of the accused only when all other factors and the circumstances surrounding the commission of the offence justify such a consideration. In the instant appeal, it cannot be overlooked that the appellant seemed to be a persistent offender in committing attempted rape on children and has the same pattern in indulging himself in sexual offences. In the instant appeal, the need to protect public interest and safety outweighs the plea of guilty in order to grant a lenient sentence.

[25] In *PP v Teh Ah Cheng* [1976] 2 MLJ 186, His Lordship Abdoolcader J (as he then was) considered both deterrence and prevention as important factors and said:

> ... that in the light of the appalling increase in crimes involving violence ... *society is crying out `enough is enough' and is no longer in any mood to tolerate such offenders.* (emphasis by this court)
>
> Deterrence in this case would be that of the respondent and likely offenders similarly inclined …

[26] This court has considered the rampancy and the plethora of sexual offences committed on young children by ruthless men and crimes of violence which are reported almost daily in the Newspapers and society, which is the ultimate guardian of decency, expects the court to take a serious view of this despicable crime so as not to impose a 'too-lax sentence'. In *PP v Chung Kwong Huah* [1981] 1 MLJ 316@317, His Lordship Chan J said:

> ... the time has come for the courts to show their disapproval by acknowledging that offences of this kind are grave and serious crimes, and that those who indulge in them must expect a severe sentence.

[27] In *PP v Safian bin Abdullah & Anor* [1983] 1 CLJ 324, His Lordship Wan Yahya J (as he then was) said:

> a stint in prison would be beneficial to them and the public for the court must protect the society from such propensity.

[28] In *Rex v Grondkowski* [1946] 1 All ER 560 at p 561, Lord Goddard said:

> The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners.

[29] In *PP v Loo Choon Fatt* [1976] 2 MLJ 256 at p 257, His Lordship Hashim Yeop A Sani J said:

> … The mitigation submitted by a convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a

situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach. The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused ...

[30] In *Reg v Davies* [1978] 67 Cr App R 207 at p 209, Lawton LJ said:

We have had to say in this Court time and time again in the past that hardship to families is not a matter which in the ordinary way we can take into consideration by way of reducing sentence.

[31] In *Abdul Karim v R* [1954] MLJ 86, Brown Acting CJ said:

In the matter of punishment, the 'type of offence' is the concern of the Legislature, which has provided the maximum punishment which can be inflicted for a serious offence of that type. *The particular offence, and the particular offender, are the concern of the Court, whose business it is to decide what punishment is merited upon the facts of the individual case within the limits which the Legislature has provided*. Any tendency to standardise punishment for any type of offence is to be deplored because it means that the individual offender is being punished not upon the facts of his particular case but because he has committed an offence of that type. This tendency is particularly to be resisted in imposing punishment for an offence for which the Legislature has not left a wide field of discretion to the Court. (emphasis by this court)

Mercy is the prerogative of the Crown and is not for the court. The business of the Court of Appeal is to see that the trial has been properly conducted with due legal form and that the sentence is not wrong in principle. It is not for the Court of Appeal to say what sentence it would have passed. Nor is it possible for the court to take into consideration sentences which have been passed in other cases. Each case depends on its own facts. The Court of Appeal cannot say that because A gets a certain sentence for a crime, B should get the same or less sentence for the same crime which has, nevertheless, been committed in the circumstances.

[32] This court is also entitled to take judicial notice of what is notorious, what everybody knows. In the instant appeal, although no violence was actually used, there was some kind of fear or threat put on the victim, the child of 10 years old. A person who commits such an offence as in the instant appeal deserves a long term of imprisonment. This court is of the view that the sentence must be designed and imposed to deter others and safeguard children so that parents will be able to maintain a peaceful life without any psychological fear for the safety of their children who travel to school, and so that they could have confidence that their children will be able to return home safely. Similarly, children must also be able to walk through our streets in peace and free from fear and it must be made crystal clear that anyone who sexually assaults or attempts to assault children cannot expect upon conviction to be dealt with leniently but with the utmost severity. It must be made clear that offenders who repeatedly commit sexual assault on children should be put off by deterrent sentences in order to ensure that the deterrent sentence imposed on an accused has a real and practical effect on would-be offenders. In the instant appeal, this court did not find any extenuating circumstances apart from the appellant's plea of guilty. It has been said time and time again that each case of

necessity depends upon its own set of facts and there is no universal application that an offender who has pleaded guilty must receive a lenient sentence. His Lordship Hashim Yeop A Sani J (as he then was) in *PP v Loo Choon Fatt* [1976] 2 MLJ 256 at p 257 said:

> … Each case has to be determined on its own merits. But in every case the courts must be realistic and rational.

[33] In *Reg v Blake* [1962] 2 QB 377 at p 383, Hilbery J said:

> It is of the highest importance, perhaps particularly at the present time, that such conduct should not only stand condemned, should not only be held in utter abhorrence by all ordinary men and women, but should receive, when brought to justice, the severest possible punishment. This sentence had a threefold purpose. *It was intended to be punitive, it was designed and calculated to deter others, and it was meant to be a safeguard to this country.* (emphasis by this court)

[34] In *Reg v Davies* [1978] 67 Cr App R 207 at p 210, Lawton LJ said:

> What then is the right sentencing policy in this class of case? … There are of course the classical considerations relevant to all sentences: retribution, deterrence, prevention and rehabilitation ... At one time it was fashionable to suggest that retribution ought not to enter into sentencing policy. That opinion, I think, is not held as strongly now as it was a few years ago. The reason is manifest; *the courts have to make it clear that crime does not pay and the only way they can do so is by the length of sentences. Sentences show the court's disapproval, on behalf of the community, of particular types of criminal conduct.*' (emphasis by this court)

[35] Lawton LJ in *Reg v Davies* [1978] 67 Cr App R 207 at p 210 said:

> ... the courts have to make it clear that crime does not pay and the only way they can do it is by the length of sentences. Sentences show the court's disapproval, on behalf of the community, of particular types of criminal conduct.

[36] In *Reg v Sargeant* [1974] 60 Cr App R 74, Lawton LJ said:

> *...society, through the courts, must show its abhorrence of particular types of crime,* and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand courts must not disregard it. *Perhaps the main duty of the court is to lead public opinion.* (emphasis by this court)

[37] In *PP v Lee Tak Keong* [1989] 1 MLJ 307, His Lordship Zakaria Yatim J (as he then was) said:

> ... the court must take into consideration the element of public interest. This means that the court must impose a deterrent sentence not only to deter the respondent from committing the same offence again but to deter others from committing the same type of crime ….. the court must also consider society's abhorrence of this type of crime. (See *Cheong Ah Cheow v PP* [1985] 2 MLJ 257, *PP v Tan Eng Hock* [1970] 2 MLJ 15, *Ong Lai Kim v PP* [1991] 3 MLJ 111, *Lee Chow Meng v PP* [1976] 1 MLJ 287, *Ooi Sim Yim v PP* [1990] 1 MLJ 88, *PP v Ooi Wang San* [1998] 2 MLJ 765)

[38] On the other hand, this court has also considered the case of *Raja Izzuddin Shah v PP* [1979] 1 MLJ 270, where Hashim Yeop A Sani J (as he then was) said:

… No plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented by the prosecution. Both aspects of the case must be considered in their true perspective so as to strike if possible, a true balance in the scale of justice. (see *PP v Doraigunaraju a/l Krishnan* [1993] 3 CLJ 664)

[39] As stated above, the facts relating to the offence in the instant appeal and the facts of the conviction for attempted rape on a child aged 10 years old by Sessions Court No 1, and the appellant's previous conviction for kidnapping a person with the intention to force her to marry, an offence under s 366 of the Penal Code, where he was sentenced to 24 months' imprisonment for that offence on 18 October 2000, was brought to the attention of this court. This court therefore took the view that this was an appropriate case for the court to exercise its revisionary powers with a view to enhance the sentence and this court found no mitigating factor in all the circumstances and facts of the case (see *DR Garner v PP* [1973] 1 MLJ 106 at p 107). Accordingly, the sentence is increased to seven years' imprisonment and three strokes of the rotan and the sentence is ordered to run consecutively with the sentence of seven years' imprisonment as imposed by the Sessions Court No 1, Ipoh.

[40] In the circumstances, the appeal by the appellant for the sentence of five years' imprisonment to run concurrently with the sentence of seven years' imprisonment imposed by Sessions Court No 1 is dismissed. The sentence is increased to seven years' imprisonment and three strokes of the rotan. The sentence of seven years' imprisonment is ordered to run consecutively with the sentence of seven years' imprisonment imposed by Sessions Court No 1.

Appeal dismissed.

Reported by Lim Lee Na